Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1043

LLOYD E. HENNIGAN, JR.,
Appellant,

versus

LOUISIANA STATE BAR ASSOCIATION,
Appellee.

On Appeal from the Supreme Court of Louisiana

JURISDICTIONAL STATEMENT

LLOYD E. HENNIGAN, JR.
P. O. Box 190
Winnfield, LA 71483

Appellant *pro se*

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No.

LLOYD E. HENNIGAN, JR.,
Appellant,

versus

LOUISIANA STATE BAR ASSOCIATION,
Appellee.

On Appeal from the Supreme Court of Louisiana

JURISDICTIONAL STATEMENT

Appellant, Lloyd E. Hennigan, Jr., an Attorney at Law, appeals from the final judgment and order disbarring him and cancelling his license to practice law in the State of Louisiana, entered on December 10, 1976, following the denial of a timely filed petition for rehearing of this cause urging reconsideration of the opinion and judgment of the Supreme Court of Louisiana on November 8, 1976.

An application for a stay of mandate and supersedeas has been made to and granted by the Supreme Court of Louisiana until February 1, 1977, which stay

siana State Bar Association is created and regulated under the rule-making power of the Supreme Court of Louisiana, pursuant to a memorial addressed to the court by the legislature in Act 54 of 1940. Section 3 of Act No. 54 of 1940 provides that "the Supreme Court is hereby memorialized to exercise its inherent powers by providing for the organization and regulation of the Louisiana State Bar Association; by providing rules and regulations concerning admissions to the Bar, the conduct and activities of the Association and its members; and by providing a schedule of membership dues, the non-payment of which shall be ground for suspension; and by providing for the discipline, suspension or disbarment of its members."

THE QUESTIONS PRESENTED

1. Whether Article XV, §8(7), Articles of Incorporation of the Louisiana State Bar Association, as applied to a conviction arising out of conduct which occurred prior to its adoption by the Supreme Court of Louisiana as a rule of that Court, constitutes an *ex post facto* law when the effect of that law is to disbar the Appellant upon a finding that the offense of which he is convicted is a "serious crime" and to deny him the opportunity to present any evidence in rebuttal of the *prima facie* case established by the conviction when such rebuttal was permitted under former Article 13, §12, Arts. of Inc. LSBA, which was in effect at the time of the act made the subject of the petition for disbarment.

2. Whether Appellant can be deprived of his right to practice law in the State of Louisiana without being

afforded the opportunity to contest the recommendations against him in a full and fair hearing, on the basis of a statute which provides that the conviction is final, unrebuttable, and unassailable proof of misconduct, allowing the respondent attorney the opportunity to offer evidence in mitigation only, and then merely evidence "not" inconsistent with the essential elements of the crime for which he was convicted as determined by the statute defining the crime.

STATEMENT OF THE CASE

Appellant was convicted in the United States District Court for the Eastern District of Louisiana for conspiracy to commit mail fraud. The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court, *sub nom. United States v. Perez*, 489 F.2d 51 (5 Cir. 1973), and this Court denied Appellant's application for a writ of certiorari on June 10, 1974. 417 U.S. 945.

Following the denial of the petition for a writ of certiorari, the Louisiana State Bar Association, through its Committee on Professional Responsibility, filed a Petition for Disciplinary Action urging Appellant's federal conviction as grounds for disbarment. The Supreme Court of Louisiana, pursuant to Article 15, §8(7)(b), Arts. of Inc. LSBA, appointed a Commissioner to conduct a hearing on the Bar Association's petition. A hearing was had before the Commissioner. Appellant attempted to introduce evidence that had been discovered since the federal trial which demonstrated that the Government's key witnesses' testimony against the attorneys and doctors who were indicted was false. At the hearing before the Com-

missioner, testimony was adduced from co-defendants in the federal trial who had elected to exercise their Fifth Amendment privilege against compulsory self-incrimination during the federal trial. Each of these co-defendants disputed the evidence given by the DeMary brothers, who were the key prosecution witnesses in Federal Court. The Bar Association objected to the introduction of this evidence, invoking the provisions of Art. 15, §8(7)(d), Arts. of Inc. LSBA, and the Commissioner received the evidence as a proffer, subject to the Bar Association's objection, and after an extensive analysis of the evidence inconsistent with Appellant's guilt of the federal crime, reluctantly invoked the provisions of Art. 15, §8(7)(d), *supra*, and held that such evidence could not be considered in this matter.

Appellant filed a peremptory exception in the Louisiana Supreme Court, urging that the proceedings here were brought under the provisions of the current Article 15, §8, Arts. of Inc. LSBA, whereas the conduct made the subject of the petition for disbarment had culminated in a federal indictment in 1967, and a federal conviction in December of 1970, more than two months before Art. 15, §8, Arts. of Inc. LSBA was promulgated and more than eight months prior to the effective date of the new disciplinary provisions (September 1, 1971). The Appellant appealed from the federal judgment of conviction and that appeal was not decided until 1973. This Court did not deny certiorari until June 10, 1974. The Supreme Court of Louisiana, for purposes of Art. 15, §8, Arts. of Inc. LSBA, determined that the conviction did not become final until this Court denied Appellant's petition for a writ

of certiorari. The Court quoted from its previous opinion in *Louisiana State Bar Association v. Edwards*, 322 So.2d 123 (La. 1975):

> "Clearly, Article 15, section 8, effective September 1, 1971, provides for the institution of disciplinary proceedings for the 'conviction of crime.' It is the date of conviction for the crime that is controlling. See *Louisiana State Bar Association v. Ponder*, 263 La. 743, 269 So.2d 228 (1972). * * *" (340 So.2d at 267.)

The Court applied the rule, which became effective after the date of Appellant's alleged conduct and federal conviction, to Appellant's case on the theory that "conviction", rather than the alleged criminal conduct, was the basis for disbarment. This ruling of the Court effectively disposed of Appellant's claim that the application to him of the new disbarment-for-conviction rule violated the Ex Post Facto Clause of the United States Constitution. The Supreme Court of Louisiana acknowledged in its opinion that the above quoted doctrine of the *Edwards* and *Ponder* cases was stated in disposition of Appellant's *ex post facto* argument. The Court said (340 So.2d at 267):

> * * * Respondent [Appellant herein] maintains that because the discipline provided for in the Louisiana State Bar Association Articles of Incorporation now in effect are more harsh than those in effect prior to September 1, 1971, this proceeding is in contravention of the United States and Louisiana Constitutions ex post facto laws. Article 1, Sections 9 and 10 of

> the United States Constitution; Article 4, Section 15 of the Louisiana Constitution of 1921.

The issue herein presented was thus squarely presented to and ruled upon by the Supreme Court of Louisiana.

In Respondent's Original Brief, filed in the Supreme Court of Louisiana on behalf of Appellant herein, the Appellant urged that the application of Article 15, §8(7)(d), Arts. of Inc. LSBA, to preclude him from adducing evidence inconsistent with the essential element of criminal intent, which was authorized under the jurisprudence construing the equivalent provision of Article 13, §12 of the former Articles of Incorporation of the Louisiana State Bar Association, *Louisiana State Bar Association v. Cawthorn*, 223 La. 884, 67 So.2d 165, 168 (1953), altered his position to his disadvantage, making this a violation of his substantive rights under the Ex Post Facto Clause of the Constitution under *Kring v. Missouri*, 107 U.S. 221 (1882), as well as deprived him of his right to a full and fair hearing before the Commissioner and the Supreme Court of Louisiana, on the issues of the disbarment action, in violation of his right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. The Court, while not specifically addressing itself to this issue, held (340 So.2d at 269):

> * * * Some of the evidence offered at the Commissioner's hearing was inconsistent with respondent's guilt. The Commissioner properly rejected this evidence. * * *

[Should this Court consider this issue to be one properly raised by petition for a writ of certiorari, rather than appeal, Appellant respectfully submits it is proper to include in this Jurisdictional Statement "any other denial of federal right whether or not capable in itself of being brought here by appeal." *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 547 (1922). The opinion of the Court below necessarily rejected Appellant's argument that the statutory procedure violated due process, whether or not it can be conclusively said that the constitutionality of the application of Art. 15, §8(d)(7), as applied, was directly challenged. *Accord, Hanson v. Denckla*, 357 U.S. 235, 244 (1958).]

The rulings of the Court below are therefore of a nature to bring this case within the provisions of 28 U.S.C. § 1257(2), believed by Appellant to confer appellate jurisdiction upon this Court.

THE QUESTIONS ARE SUBSTANTIAL

1. Introduction.

Two fundamental questions are presented by this appeal. One relates to the constitutionality of applying, against a person whose license to practice law is at stake, a body of law which did not exist at the time of the alleged conduct underlying the disciplinary action taken against him. The other relates to the constitutionality of a system of disbarment based on the seriousness of the offense and then denying the respondent attorney the right to present, in mitigation

or to refute justification for disbarment, evidence consistent with his innocence of the offense for which he has been convicted.

A growing number of lawyers are being prosecuted for alleged criminal offenses in Louisiana, and even throughout the nation.

2. The Due Process Issue — Rebuttal at Hearing

The right of attorneys to due process in disbarment proceedings has been established by the opinions of this Court. *Spevack v. Klein*, 385 U.S. 511 (1967). The right to a hearing before the government may deprive a man of a license to engage in a professional pursuit has been affirmed by this Court. *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963); *cf. Goldsmith v. Board of Tax Appeals*, 270 U.S. 117, 123 (1926). The right to defend oneself in a hearing, rather than just the right to make an appearance and to observe a tribunal deprive one of his rights, is the true meaning of a hearing within the requirements of due process. This Court, in one of its earliest reversals of state proceedings on the ground of the denial of due process, noted the fundamental essence of due process to be:

> It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that by "the law of the land" is intended "a law which hears before it condemns," have been repeated in varying forms in a multitude of decisions. In *Holden v. Hardy*, 169 U.S. 366, 389 (1898), the necessity of due notice and an opportunity of being heard is described as among the "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." And Mr. Justice Field, in an earlier case, *Galpin v. Page*, 18 Wall. [85 U.S.] 350, 368, 369 (1874), said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. "Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered." Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so. [*Powell v. Alabama*, 287 U.S. 45, 68 (1932).]

The dissenting opinion of Mr. Justice Dennis of the Supreme Court of Louisiana, in the companion case of *Louisiana State Bar Association v. Shaheen*, 338 So.2d 1347, 1355 (1976), collects more recent authorities which have each been grounded upon the proposition stated in the *Powell* case, *supra*.

It is therefore obvious that the opportunity to be heard on the basic question, the lack of moral fitness to continue practicing law, is the paramount essential of a fair and full hearing on the propriety of disbarment or other penal sanctions following a conviction. That question can be determined only by an analysis of the conduct underlying the conviction, and not by the fact of conviction alone when the State has provided that disbarment is proper only for a "serious offense." Art. 15, §8(2), LSBA Arts. of Inc.

The effect of the judgment and opinion of the Court below is to interpose an irrebuttable presumption of guilt, without regard to evidence of innocence, which, in itself, violates due process of law as determined by this Court in *Leary v. United States*, 395 U.S. 6 (1967), and *Tot v. United States*, 319 U.S. 463 (1943). Where, in this case, there was affirmative proof of the innocence of Appellant of the underlying crime of which he stands convicted in the Federal Court, there was no rational basis for irrebuttably presuming his guilt without providing him an opportunity to show the State Court the error made in the Federal Court.

The plight of Appellant is not isolated or unique. Each of the lawyers convicted with him, except for Ernest C. Hamilton whose case is now being considered, have been denied the opportunity to produce any evidence negating guilt — the most important mitigating factor of all — while they have been free to present all other useless and ineffectual trivia which the Court would consider mitigating but not touching the essential elements of the alleged crime. *E.g., Louisiana State Bar Association v. Loridans*, 338 So.2d

1338 (La. 1976); *Louisiana State Bar Association v. Shaheen, supra*. The problem is one which is recurring in Louisiana and which will persist unless this Court intervenes to define the nature of a hearing on what constitutes a "serious offense."

3. The Ex Post Facto Issue.

Article 1, §10, clause *i* of the United States Constitution provides that "No State shall * * * pass any * * * ex post facto Law."

Generally speaking, a law is ex post facto which, in relation to an offense committed before its passage, alters the situation of a party to his disadvantage. *Kring v. Missouri*, 107 U.S. 221 (1882); *In re. Medley*, 134 U. S. 160 (1890); *Lindsey v. Washington*, 301 U.S. 397 (1937).

For the question of ex post facto to arise, it must first be determined that the crime in question was committed before the change in law concerning that crime became effective. Courts have shown a difference of opinion concerning the problem of when a crime is committed. Some courts have said that the act constitutes a crime and that the consequences merely relate back and characterize the act. See *Stout v. State*, 76 Md. 317, 25 Atl. 299, 301 (1892); *Moran v. Territory*, 14 Okl. 544, 78 Pac. 11, 113 (1904); *State v. McCoomer*, 79 S. C. 63, 60 S. E. 237, 238 (1908); *State v. Masino*, 43 So.2d 685 (1949). Other courts have said that it is neither the act nor the consequence alone that constitutes the crime, but the combination of the two. See *Brockway v. State*, 192 Ind. 656, 138 N. E. 88 (1923);

Alderson v. State, 196 Ind. 22, 145 N. E. 572, 573 (1924). If a crime is defined as an act irrespective of the consequences, the crime is the act; but if a crime is defined to include some consequence of the act, the crime is the consequence when produced by human agency. See *Daeche v. U.S.*, 250 Fed. 566, 570 (C.C.A. 2d 1918).

With reference to the crime of conspiracy, of which respondent stands convicted, it exists from the time of the conspiratorial agreement, but must have some overt act as a consequence in order to complete the crime. 18 U.S.C.A. 371. In the instant case, the alleged conspiracy occurred in 1965 and 1966, and the overt acts occurred during those times. This is the effective date. Further, respondent was indicted in April, 1967, trial was commenced in October, 1970, and the conviction by the trial jury occurred in December, 1970, all of which occurred prior to the effective date of the present Article 15. Thus, in any event, the ex post facto time element is present here.

The situation of respondent has been altered to his disadvantage. Under the laws governing disciplinary proceedings prior to the effective date of the new Article 15, (1) there was no mandatory minimum of five years required before application for reinstatement (Art. 13, §12); (2) upon the person convicted being pardoned by the President or Governor, the court upon application could vacate or modify such order of disbarment (former Art. 13, §12); (3) conviction in a state or federal court merely set out a *prima facie* case of misconduct, which respondent may refute, whereas the new rules accept the conviction as final and unassailable [*compare* Art. 15, §8(7)(d) *with* former Article 13, §12, and *Louisiana State Bar Association v. Cawthorn*, 223 La. 884, 67 So.2d 165, 168 (1953)].

Further, it must be noted that under the provisions in effect prior to September, 1971, disciplinary action could have been instituted by the bar association any time subsequent to April, 1967. The choice lay with the Bar Association, not respondent, and he should not be penalized by the election made by the Bar Association to take no action until subsequent to the adoption of the present Articles of Incorporation in 1971.

Obviously, substantially different issues of procedure and substance are presented to the Court if this matter is considered under the rules in force prior to October, 1971; the issue under those rules will be whether or not the respondent can refute the presumption of misconduct created by the judgment of conviction as set out in the allegations of the petition for disciplinary action. The position of the Bar Association, adopted by the Commissioner and this Court, is that the certificate of conviction is conclusive of the fact of respondent's guilt, as provided by the current LSBA Article 15. It necessarily follows that these entire proceedings are tainted by the fact that they are brought under the wrong statute, and should be dismissed, because respondent is entitled, under the provisions relative to this cause in effect at the time of the commission of the crime, to refute the presumption created by the conviction; alternatively, the entire record should be considered for this purpose.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and transfer this cause to the Appellate Docket. Alternatively, Appellant prays this Court will treat the papers filed as a petition for a writ of certiorari to the Supreme Court of Louisiana, pursuant to 28 U.S.C. §2103, grant the said writ and put this cause on the Appellate Docket for plenary consideration, with briefs and oral argument on the issues raised by this Jurisdictional Statement.

Respectfully submitted,

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Appellant pro se.

PROOF OF SERVICE

I, Lloyd E. Hennigan, Jr., an attorney and the Appellant *pro se*, depose and say that on the 28th day of January, 1977, I served a copy of the foregoing Jurisdictional Statement on the Louisiana State Bar Association, Appellee herein, through its Committee on Professional Responsibility, directed to the attention of Mr. Thomas O. Collins, Jr., Counsel, by placing the same in an envelope addressed to Mr. Collins at his office located at Room 101, Supreme Court Building, 301 Loyola Avenue, New Orleans, LA 70112, with first class postage prepaid.

LLOYD E. HENNIGAN, JR.
Appellant *pro se*

Sworn to and subscribed before me this ____ day of January, 1977.

NOTARY PUBLIC
My Commission is Issued for Life.

APPENDIX A

STATE OF LOUISIANA

No.

LOUISIANA STATE BAR ASSOCIATION,
Petitioner,

versus

LLOYD E. HENNIGAN, JR.,
Respondent.

ORDER FOR SUPERSEDEAS, STAY OF EXECUTION AND STAY AND RECALL OF MANDATE AND STAY AND ARREST OF JUDGMENT

On consideration of the petition and motion of LLOYD E. HENNIGAN, JR., applicant in the above numbered and entitled cause:

IT IS ORDERED that the execution and mandate and enforcement of the judgment and decree rendered in the above entitled and numbered cause ordering the disbarment of applicant and cancelling his license to practice law in this State be, and it is hereby, recalled, stayed, and arrested pending and until the 1st day of February, 1977, in order to permit LLOYD E. HENNIGAN, JR. to appeal herein to the Supreme Court of the United States, and (in the alternative) to seek a writ of certiorari from said Court and, in the event LLOYD E. HENNIGAN, JR. shall timely file a notice of appeal to the Supreme Court of the United States (or timely apply to said court for writs of certiorari or review),

then it is ordered that the execution and mandate, and enforcement of the judgment and decree rendered in the above entitled and numbered cause be, and it is hereby, recalled, stayed, and arrested until the Supreme Court of the United States shall have made its final disposition of this case.

New Orleans, Louisiana, this 17th day of December, 1976.

/s/ JOE W. SANDERS
CHIEF JUSTICE, SUPREME COURT OF THE STATE OF LOUISIANA

SUPREME COURT OF LOUISIANA
A TRUE COPY
DEC 17 1976
/s/ PHIL TRICE
Deputy Clerk

APPENDIX B

LOUISIANA STATE BAR ASSOCIATION

v.

Lloyd E. HENNIGAN.

No. 55436.

Supreme Court of Louisiana.

Nov. 8, 1976.

Rehearing Denied Dec. 10, 1976

DISBARMENT PROCEEDING

SANDERS, Chief Justice.

The Louisiana State Bar Association, through its Committee on Professional Responsibility, instituted this disbarment proceeding against Lloyd E. Hennigan, a member of the bar of this State. The Committee's petition relies upon the authority of Section 8 of Article 15 of the Articles of Incorporation of the Louisiana State Bar Association, effective September 1, 1971, and is based upon respondent's conviction in federal court for conspiracy to commit mail fraud in violation of 18 U.S.C. § 1341. This Court has original jurisdiction over these proceedings as provided in Section 10 of Article 7 of the Louisiana Constitution of 1921.[1]

---

1 At the time the Louisiana State Bar Association filed this petition for disciplinary action on October 11, 1974, the Louisiana Constitution of 1921 was still in effect. The pertinent jurisdictional authority is now contained in Article 5, Section 5 of the Louisiana Constitution of 1974.

On April 3, 1967, the United States Eastern District Grand Jury indicted respondent, Lloyd E. Hennigan, for mail fraud and conspiracy to commit mail fraud, in violation of 18 U.S.C. §§ 371, 1341, respectively. On December 18, 1970, after a jury trial, Hennigan was found guilty of conspiracy to commit mail fraud. The court sentenced him to serve three years imprisonment. His sentence was later amended to three years active probation.

Respondent appealed his conviction and sentence to the Fifth Circuit of the United States Court of Appeals. That court affirmed his conviction and sentence. *U.S. v. Perez*, 489 F.2d 51 (1973). Respondent applied for a rehearing, which was denied.

Respondent then applied for a writ of certiorari to the United States Supreme Court. On June 10, 1974, the Supreme Court denied writs. Respondent's conviction became final twenty-five days thereafter, in accordance with Rule 58 of the Rules of the United States Supreme Court.

The Louisiana State Bar Association, acting pursuant to Section 8, paragraphs 7(a)-(d) of Article XV of the Louisiana State Bar Association, through the Committee on Professional Responsibility, filed a petition for appropriate disciplinary action with the Supreme Court of Louisiana on October 11, 1974.

In response to that petition, respondent filed various exceptions to the proceedings, which this Court ordered referred to the merits. Respondent then answered the petition by way of a general denial, affirmatively asserting, however, that he was innocent of the charges for which he stood convicted and giving notice that he intended to produce evidence of extenuating circumstances.[2] On October 29, 1975, a hearing was held before John V. Parker, the Commissioner appointed by this Court to conduct the proceedings. Louisiana State Bar Association Articles of Incorporation, Article 15, § 8(7)(b) (1971).

At the hearing, the Committee introduced into evidence the record of the instant proceedings, including the original petition for disciplinary action, certified copies of the certificate of conviction of the United States District Court for the Eastern District of Louisiana, and photostatic copies of the opinion of the United States Court of Appeal, Fifth Circuit in the case of *United States v. Perez*, supra. At this point, respondent requested the introduction of the entire transcript of evidence before the United States District Court and of all motions and pleadings filed in that court subsequent to the conviction. The Commissioner overruled respondent's motion to introduce in globo the additional material on the basis that under the Articles of Incorporation of the Louisiana State Bar Association, the Committee is only required to introduce the "certificate of the conviction of the respondent." Respondent objected to the Commissioner's ruling and proffered the evidence. The Commissioner,

2 Subsequent to the filing of the answer, a supplemental petition to the earlier filed exception of prematurity was filed, alleging that the matter was premature because a motion for a new trial was pending before the federal district court. The motion was denied, but apparently is presently being considered by the United States Court of Appeal, Fifth Circuit. Before this Court, respondent is contending that his conviction is not final.

however, did rule that particular portions of the record referred to specifically by page and line number which respondent desired reviewed would be considered.

After the hearing on October 29, 1975, the Commissioner found that the crime, conspiracy to commit mail fraud, warranted cancellation of respondent's license to practice law.

The Louisiana State Bar Association then timely filed its concurrence in the Commissioner's Report with this Court seeking respondent's disbarment.

Respondent contends that the disciplinary action pending against him is improperly instituted under Article 15, § 8 of the Louisiana State Bar Association Articles of Incorporation, which provides:

"(1) Upon learning that an attorney has been convicted of a crime, whether the conviction results from a plea of guilty or nolo contendere or a verdict after trial, the Committee on Professional Responsibility may secure a certificate of such conviction from the applicable Clerk of Court.

"If the conviction is obtained in a Court of another state or a Federal Court, the Committee upon learning of the conviction, shall obtain two (2) copies of a certificate of conviction from the proper Court, and shall retain one (1) copy and may forward the other copy to the Supreme Court.

"(2) The Committee shall then make a determination whether or not the crime of which the attorney has been convicted constitutes a serious crime. The term 'serious crime' means a felony or any other crime, the necessary element of which as determined by the statute defining such crime, reflects upon the attorney's moral fitness to practice law.

"It will be necessary for the Committee in determining whether or not the crime constitutes a 'serious crime,' to study the statute defining the crime, particularly if the crime involves the violation of a statute of the Federal Government or another state or jurisdiction.

"(3) Upon completing its determination as to whether or not the crime constitutes a 'serious crime,' the Committee shall file a written report with the Supreme Court, setting forth its findings and conclusions.

"(4) If the Supreme Court should concur with the opinion of the Committee that the crime of which the attorney has been convicted constitutes a serious crime, the Supreme Court may suspend the respondent from the practice of law and order the Committee to institute the necessary disciplinary proceedings, provided however, that the disciplinary proceedings so instituted will not, unless requested by the accused, be brought to a hearing until all appeals from the conviction are concluded.

"(5) If the Committee in its report to the Supreme Court has concluded that the crime of which the attorney has been convicted is not a serious crime, or if the Supreme Court should determine independently that the crime is not a serious crime, the Supreme Court will refer the matter back to the Committee.

"(6) An attorney will be reinstated immediately on the reversal of his conviction for a serious crime that has resulted in his suspension, but the reinstatement will not terminate any disciplinary proceedings then pending against the attorney.

"(7) After the conviction has become final, that is, all appeals have been concluded or exhausted, the procedure shall be as follows:

"(a) The Committee will file a petition in the Supreme Court seeking disbarment or any other remedy that the Committee deems appropriate, and the petition will be served upon the respondent in the same manner as in ordinary proceedings.

"(b) When issue is joined by answer by the respondent, a Commissioner will be appointed by the Supreme Court to represent the Court in the same manner as in ordinary proceedings.

"(c) At the hearing before the Commissioner, the certificate of the conviction of the respondent shall be conclusive evidence of his guilt of the crime for which he has been convicted.

"(d) At the hearing based upon a respondent's conviction of a crime, the sole issue to be determined shall be whether the crime warrants discipline, and if so, the extent thereof. At the hearing the respondent may offer evidence only of mitigating circumstances not inconsistent with the essential elements of the crime for which he was convicted as determined by the statute defining the crime.

"(8) Except, as provided hereinabove in this Section, the procedure with reference to proceedings based on a conviction of a crime, shall be conducted in the same manner as in ordinary proceedings."

Respondent argues that the instant proceeding should have been instituted pursuant to the Articles of Incorporation in effect at the time of the commission of the criminal act of which he was convicted. He argues that he was convicted of conspiracy to commit mail fraud which is charged to have transpired during 1965 and 1966 and that the Louisiana Bar Association could have instituted disciplinary action any time subsequent to April, 1967. Respondent maintains that because the discipline provided for in the Louisiana State Bar Association Articles of Incorporation now

in effect are more harsh than those in effect prior to September 1, 1971, this proceeding is in contravention of the United States and Louisiana Constitutions ex post facto laws. Article 1, Sections 9 and 10 of the United States Constitution; Article 4, Section 15 of the Louisiana Constitution of 1921.

Prior to September 1, 1971, discipline and disbarment rules were embodied in Article 13, § 12 of the Louisiana State Bar Association Articles of Incorporation. The former rule provided in pertinent part:

> "Whenever any member of the bar shall be convicted of a felony and such conviction shall be final, the Committee may present to the Supreme Court a certified or exemplified copy of the judgment of such conviction, and thereupon the court may, without further evidence, if in its opinion the case warrants such action, enter an order striking the name of the person so convicted from the roll of attorneys and cancelling his license to practice law in the State of Louisiana."

In *Louisiana State Bar Association v. Edwards*, La., 322 So.2d 123 (1975), the respondent attorney raised the same argument. He attacked the Committee's proceeding under Article 15, as amended and effective September 1, 1971, for a crime committed prior to the adoption and effective date of said article. We stated:

> "Clearly, Article 15, section 8, effective September 1, 1971, provides for the institution of disciplinary proceedings for the 'conviction

> of a crime.' It is the date of conviction for the crime that is controlling. See *Louisiana State Bar Ass'n v. Ponder*, 263 La. 743, 269 So.2d 228 (1972). Therefore, since respondent was adjudged convicted of the offense of violating 18 U.S.C. § 2313 based upon his plea of nolo contendere on September 3, 1971, the Committee properly proceeded under Article 15, section 8, as amended and effective September 1, 1971. Therefore, the fact of the 'substantive change,' if any, is of no moment."

In *Louisiana State Bar Association v. Ponder*, 263 La. 743, 269 So.2d 228 (1972), in ruling upon an exception of prematurity, we stated:

> "The current Articles of Incorporation of the Louisiana State Bar Association became effective on September 1, 1971. Because respondent's conviction became final after this date, the committee properly instituted this disciplinary action pursuant to Article 15, Section 8(7) of the Articles of Incorporation of 1971."

Although *Edwards* did not specify final conviction, the Court's reliance on *Ponder*, supra, which specifically applied the date of final conviction, supports the conclusion that the date of final judgment is determinative. This conclusion is further supported by 1 Wright, Federal Practice and Procedure, Section 175, which provides in pertinent part:

> "The entry of a plea of guilty has the effect of admitting all material facts alleged in the charge. No further proof of the crime is required, though, as noted in the preceding section, no judgment may be entered on the plea unless the court is satisfied that there is a factual basis for the plea. The plea is not merely evidence for the government. It is a formal criminal pleading, waiving a trial and defense, and leaving the court nothing to do but to impose sentence and enter judgment."

In *Edwards*, supra, the conviction was based on the respondent's plea of nolo contendere, equivalent to a guilty plea for most procedural purposes.

Hennigan's conviction became final twenty-five days after the United States Supreme Court denied writs. Rule 58 of the United States Supreme Court Rules; *Cutrer v. Humble Oil & Refining Co.*, 228 F.Supp. 787 (E.D.La. 1964), aff'd *Stevens v. Humble Oil & Refining Co.*, 346 F.2d 43 (5th Cir. 1965), cert. denied 382 U.S. 978, 86 S.Ct. 546, 15 L.Ed.2d 468 (1966). See also *Louisiana State Bar Association v. Ponder*, supra; *Louisiana State Bar Association v. Edwards*, supra.

Thus we hold that, as Hennigan's conviction became final after the September 1, 1971 effective date, the disciplinary action is properly instituted under the provisions as set forth in the 1971 Articles of Incorporation.

The sole issue to be determined by this Court in a disciplinary proceeding based on a conviction of a crime

is whether "the crime warrants discipline, and if so, the extent thereof." Louisiana State Bar Association Articles of Incorporation, Article 15 § 8(7)(d).

The basic facts surrounding respondent's conviction for conspiracy to commit mail fraud were set forth by the United States Court of Appeal, Fifth Circuit, in *United States v. Perez*, supra, as follows:

> ". . . The Louisiana-wide get-rich-quick scheme involved the staging of fraudulent automobile accidents for the purpose of creating false personal injury claims. These claims would be submitted to the insurance carriers for the respective vehicles involved in the wrecks with the aid and contrivance of certain physicians and lawyers.
>
> "As the scheme evolved, the participants even coined their own terminology which, though alien to the uninitiated, became known to all those who participated. This glossary of modern day crookedness was quite descriptive. Certain participants were known as 'recruiters.' The recruiter's function, not unnaturally, was to recruit others who assumed titles commensurate with their organizational function. There were the 'hitters', whose function it was to drive the 'hitter' vehicle in each collision which supposedly was to be liable for causing the accident. Then there was the 'target' vehicles. The occupants of the 'target' were known as the 'driver' and the 'riders.' It was determined at

the outset that pregnant women made exceptionally good riders as they could claim pregnancy related injuries which would be both hard to disprove and easily settleable with the insurance carriers. Throughout the scheme there was an effort made on the part of the participants to use vehicles and drivers which were covered by high limits of liability insurance.

"According to a pre-arranged timetable, the 'hitter' vehicle would strike the 'target' vehicle either broadside or in the rear end. The occupants of the 'target' vehicle — the driver and riders — and occasionally some of those in the 'hitter' vehicles, feigning injuries, would be sent to a particular doctor and lawyer who would facilitate phony claims by creating a medical history for treatment of nonexistent injuries and making a demand on the appropriate insurance company.

"The key to immediate financial gain in each staged collision was advances paid by the attorneys to the 'riders' for whom allegedly false claims were being submitted. These advances were paid in the form either of cash payments or loans from local financial institutions, co-signed by the attorney handling the claim. Of the usual advance ranging from $250 to $500, part was retained by the rider-claimant with the rest being distributed among the organizers, recruiters, and others who assisted with various aspects of staging

the wreck. When the claim was ultimately settled with the insurance carrier, the proceeds would be applied to (i) repay the advancing attorney or in such cases, to liquidate the guaranteed bank loan and (ii) to pay the inflated doctor's bill, not infrequently, with kickbacks going to both the organizers and the participating attorneys in addition to their usual shares.

"The feature of this case which brought it into federal court was that, in the course of asserting and negotiating for settlement the fraudulent claims of the voluntary victims, the United States mails were used." (footnotes omitted)

Under Article 15, Section 8(7)(d) of the Louisiana State Bar Association Articles of Incorporation, respondent was entitled to offer evidence at the Commissioner's hearing of "mitigating circumstances not inconsistent with the essential elements of the crime for which he was convicted." This means, of course, that he cannot offer in mitigation any evidence inconsistent with his guilt of the crime. Some of the evidence offered at the Commissioner's hearing was inconsistent with respondent's guilt. The Commissioner properly rejected this evidence. The disciplinary procedure is designed to avoid a retrial of the criminal charge, of which the respondent has been convicted under constitutional safeguards in a court of competent jurisdiction. The mitigating circumstances which respondent properly presented i.e., that since conviction he has led an exemplary life and that

he has already suffered loss from the conviction do not detract from the fact that the crime relates directly to a flagrant abuse of respondent's skills as an attorney. We agree with the Commissioner's finding that respondent's conviction of conspiracy establishes that his conduct violates at least two provisions of the Code of Professional Responsibility:

Disciplinary Rule 1-102 provides in part:

"(A) A lawyer shall not:

* * * *

"(3) Engage in illegal conduct involving moral turpitude.

"(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

"(5) Engage in conduct that is prejudicial to the administration of justice."

Disciplinary Rule 7-102 provides in part:

"(A) In his representation of a client, a lawyer shall not:

* * * *

"(4) Knowingly use perjured testimony or false evidence.

"(5) Knowingly make a false statement of law or fact.

"(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

"(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

In conclusion, we agree with the Commissioner's report and find respondent has been convicted of a serious crime which reflects on his moral fitness to practice law and find that under the circumstances of this case disbarment is the appropriate disciplinary action.

For the reasons assigned, it is ordered, adjudged, and decreed that Lloyd E. Hennigan be and he is hereby disbarred from the practice of law in Louisiana and, accordingly, his license to practice is cancelled. Respondent is to bear all costs of this proceeding.

TATE, J., recused, having served as a character witness in the federal proceedings.

DENNIS, J., dissents with reasons.

DENNIS, Justice (dissenting).

I respectfully dissent for the reasons assigned by me in *Louisiana State Bar Association v. Philip J. Shaheen, Jr.*, 338 So.2d 1347 (La.1976), No. 55,432.

APPENDIX C

DENNIS, Justice (dissenting).

I fully agree that disciplinary action must be taken against the respondent. I will even concede that perhaps he should be disbarred. However, I cannot approve the result of this proceeding, because in my opinion it was achieved without affording the respondent due process of law.

As the majority opinion correctly reflects, disciplinary proceedings were commenced against respondent because of his conviction in federal court of mail fraud and conspiracy to commit mail fraud. The principle crime is defined by 18 U.S.C. § 1341, as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or

> authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

In essence, the crime could involve a swindle of anything from a few cents to millions of dollars through use of the mails.

The main thrust of Shaheen's defense was that his degree of culpability was not sufficient to warrant disbarment, because he was only peripherally involved in a scheme perpetrated by others. The respondent attempted to prove this by offering testimony, affidavits and transcripts. But this evidence was given little, if any, regard by the Commissioner because he concluded that "the question of the degree of knowledge on the part of [Shaheen] is not properly at issue" and that no evidence which tended to disprove Shaheen's guilt of any aspect of the crimes of which he was convicted could be considered. The Commissioner stated that his decision in this regard was dictated by Article XV, § 8(7)(d) of the Louisiana State Bar Association Articles of Incorporation, which provides:

"(7) After the conviction has become final, that is, all appeals have been concluded or exhausted, the procedure shall be as follows:

"* * *

"(d) At the hearing based upon a respondent's conviction of a crime, the sole issue to be determined shall be whether the crime warrants discipline, and if so, the extent thereof. At the hearing the respondent may offer evidence only of mitigating circumstances not inconsistent with the essential elements of the crime for which he was convicted as determined by the statute defining the crime."

The majority opinion, as I understand it, has adopted the Commissioner's interpretation of the article.

I do not agree with this interpretation. Standing alone the last quoted sentence, of course, can be given such a construction. However, it would be at odds then with the preceding sentence, which sets forth the principal duty of this Court in this kind of disciplinary proceeding, and that is to determine "whether the crime warrants discipline, and if so, the extent thereof." Instead, I would construe the entire section to allow the respondent to introduce evidence, not to totally disprove his guilt, but in order to show that the degree of his culpability is not as great as that which might be inferred from the face of the judgment of conviction against him. It is conceivable that the circumstances under which an attorney has participated in the wrongful conduct of a client might be such that

moral turpitude would be slight and yet the attorney might be guilty in fact and in law of a crime. Such a situation might justify less drastic action than permanent disbarment of the attorney. *See, In re Tinkoff*, 101 F.2d 341 (7th Cir. 1939). *Cf. La. State Bar Association v. Ponder*, ___ So.2d ___ (La.1976). (After considering evidence in mitigation of *guilt* the Court suspended an attorney for six months following his conviction of making false income tax returns). If we do not recognize this possibility and allow the consideration of evidence tending to prove it, I simply do not see how we can intelligently determine the extent to which an attorney's crime warrants discipline.

On the other hand, if the article of incorporation cannot be construed as suggested, I would have no recourse but to find the sentence barring introduction of evidence mitigating the degree of guilt unconstitutional as denying due process under both the federal and state constitutions.

The right to hold specific employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment to the United States Constitution, *Greene v. McElroy*, 260 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959); *Dent v. West Virginia*, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796, 64 A.L.R.2d 288 (1957); *Peters v. Hobby*, 349 U.S. 331, 352, 75 S.Ct. 790, 99 L.Ed. 1129, 1144 (1955) (concurring opinion); cf. *Slochower v. Board of Higher Education of City of New York*, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956); *Truax v.*

Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 60 L.Ed. 131 (1915); *Allgeyer v. Louisiana*, 165 U.S. 578, 589, 590, 17 S.Ct. 427, 431, 41 L.Ed. 832, 835, 836 (1897); *Powell v. Pennsylvania*, 127 U.S. 678, 684, 8 S.Ct. 992, 995, 32 L.Ed. 253, 256 (1888). Moreover, the requirements of procedural due process must be met before a state can exclude a person from practicing law, including a full and fair hearing in which that person is given an opportunity to contest the bases of the recommendations against him. *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963). The Louisiana Constitution of 1974 grants each citizen equally broad protection of liberty in the pursuit of a profession as well as his right to due process and a fair hearing before any governmental restriction may be placed thereon:

La.Constitution Article I, § 2 provides:

> "No person shall be deprived of life, liberty, or property, except by due process of law."

La.Constitution Article I, § 19 provides:

> "No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based. This right may be intelligently waived. The cost of transcribing the record shall be paid as provided by law."

In reaching the decision to disbar Philip Shaheen the Commissioner and this Court did not follow the requirements of the article of incorporation, as correctly interpreted, and certainly did not heed the precepts of our constitutional law. Insofar as I have determined, neither this Court nor the Commissioner has reviewed the record of the federal trial which led to the respondent's convictions, although this evidence was available to both. This record undoubtedly contains evidence relevant to the degree of his culpability in the form of testimony in his favor as well as cross-examination of the witnesses against him. Instead of reviewing this evidence, the Commissioner and the Court merely accepted as proven those facts stated in the Fifth Circuit Court of Appeals opinion. With all due respect to the able author of that opinion, there are several reasons it should not be used as a basis for our judgment of the extent of discipline warranted in this case. The author was not authorized by our constitution or laws to act as a finder of fact in Louisiana attorney disciplinary proceedings. His function in preparing the opinion was not that of a trier of fact, but that of a federal appellate judge assembling the evidence which would reasonably support the jury's verdict. In doing so, it may have been unavoidable for him to emphasize some of the most damning evidence against the respondent while properly considering it unnecessary to recite any mitigating evidence in his favor. An independent review of the record of respondent's trial by the Commissioner and this Court would have required some additional effort but not a retrial of the case as suggested by the Commissioner's report and the majority opinion. It seems that in order to afford a fair hearing or its equivalent this is

the least that should have been done before stripping respondent of his right to practice law and thereby grievously injuring him, his wife, his five children, and his dependent mother. In concentrating their attention on the federal court of appeals opinion, and in refusing to consider the evidence offered by respondent to show that his involvement in the unlawful scheme was limited, the Commissioner and this Court have deprived respondent of liberty and property without due process of law and may have committed a grave injustice.

I respectfully dissent.

APPENDIX D

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

FOR IMMEDIATE NEWS RELEASE

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 10th day of December, 1976, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

* * * *

REHEARINGS REFUSED:

55,436 La. State Bar Assoc. v. Hennigan
TATE, J., recused.
DENNIS, J., is of the opinion a rehearing should be granted.

* * * *

APPENDIX E

STATE OF LOUISIANA

NO. 55,436

LOUISIANA STATE BAR ASSOCIATION,
Petitioner,

versus

LLOYD E. HENNIGAN, JR.,
Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Filed: December 16, 1976.

I.

Notice is hereby given that LLOYD E. HENNIGAN, JR., hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Louisiana entered in this suit on the 10th day of December, 1976 (said judgment having been initially rendered on the 8th day of November, 1976, and the finality thereof having been suspended by the timely filing of an application for rehearing, which application for rehearing was denied on the 10th day of December, 1976), which judgment ordered the disbarment of appellant from the practice of law in Louisiana and the cancellation of his license so to practice, which judgment upheld the validity of the application of Section 8 of Article 15 of the Articles of Incorporation of the LOUISIANA STATE BAR

ASSOCIATION, effective September 1, 1971, as against the contention that the application of said statute in said cause is repugnate to and violative of the Constitution of the United States.

This appeal is taken pursuant to Title 28 United States Code, Section 1257(2); Federal Code Annotated, Title 28, Section 1257(2).

II.

The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. A complete transcript of all proceedings had in this matter in the Supreme Court of Louisiana, including but not limited to the following:

   a. The complete transcript of the proceedings had before the commissioner duly appointed to take evidence, in the form in which the same was filed with before the Supreme Court of the State of Louisiana.

   b. The original and supplemental briefs filed on behalf of the LOUISIANA STATE BAR ASSOCIATION and on behalf of LLOYD E. HENNIGAN, JR.

   c. Opinion and judgment of this Honorable Court rendered November 8,

1976, and full text of dissenting opinion of Justice Dennis dated November 17, 1976, including text of reasons assigned in Louisiana State Bar Association v. Philip J. Shaheen, Jr., #55,432.

d. Application for rehearing filed by LLOYD E. HENNIGAN, JR.

e. Extract from the minutes of the Supreme Court of the State of Louisiana showing denial of the application for rehearing on December 10, 1976.

f. Application for supersedeas, stay and recall of mandate.

g. Order of supersedeas, stay of execution and stay and recall of mandate and stay and arrest of judgment.

III.

QUESTIONS PRESENTED BY THIS APPEAL

This issue herein arises within the following framework:

1. Appellant was indicted in the United States District Court, Eastern District of Louisiana in 1967 for alleged activities occurring in 1965 and 1966; he was acquitted by the court on motion for directed verdict of four (4) counts of mail fraud, and was convicted by the jury on one (1) count of

conspiracy to commit mail fraud on December 18, 1970.

2. In April, 1971, the court sentenced him to serve three (3) years imprisonment; his sentence was later amended to three (3) years active probation.

3. Appellant herein appealed his conviction and sentence to the Fifth Circuit of the United States Court of Appeals, which affirmed the conviction and sentence, and subsequently denied his application for rehearing.

4. Appellant then applied for a writ of certiorari to the United States Supreme Court, which was denied on June 10, 1974.

5. The LOUISIANA STATE BAR ASSOCIATION, acting pursuant to Section 8, Paragraph 7(a-d) of Article XV of the LOUISIANA STATE BAR ASSOCIATION, which became effective September 1, 1971, through the Committee on Professional Responsibility, filed a petition for disciplinary action with the Supreme Court of Louisiana on October 11, 1974, in response to which various exceptions to the proceedings were filed, which the Supreme Court of Louisiana ordered referred to the merits. Appellant answered the petition, denying the several allegations thereof, and affirmatively

asserting his innocence of the charges for which he stood convicted and giving notice of his intention to produce evidence relating thereto.

6. On October 29, 1975, a hearing was held before John V. Parker, the commissioner appointed by the Supreme Court of Louisiana to conduct the proceedings under the provision of the aforesaid Article XV of the LOUISIANA STATE BAR ASSOCIATION, Articles of Incorporation.

7. At all times pertinent hereto, the LOUISIANA STATE BAR ASSOCIATION contends, the Commissioner found, and the Supreme Court of Louisiana concluded that the LOUISIANA STATE BAR ASSOCIATION Articles of Incorporation, Article XV, was applicable in these proceedings; that the certificate of conviction is conclusive of the fact of appellant's guilt as provided therein, and any evidence tending to negate appellant's guilt was inadmissable in these proceedings.

8. On November 8, 1976 the Supreme Court of Louisiana entered judgment, under the aforesaid Article XV ordering that appellant be disbarred from the practice of law in Louisiana, and, accordingly, cancelling his license to practice.

At all times pertinent hereto, prior to September 1, 1971, disciplinary proceedings relative to attorneys in Louisiana, were controlled by LOUISIANA STATE BAR ASSOCIATION Articles of Incorporation Article XIII. This rule, as interpretated by the Supreme Court in unbroken fiat up to September 1, 1971, is clearly stated in the following excerpt from *Louisiana State Bar Association* v. *Cawthorn*, 67 So.2d 165:

> "What the decisions in those cases stand for, as far as is pertinent to the present discussion, is that the conviction of an attorney, of a felony, in either a State or Federal Court, may set out a prima facie case of misconduct authorizing disbarment and that the rule of this Court so providing in substance, is one of evidence affecting the burden of proof which is then placed on the defendant to go forward with evidence at a hearing before the Commissioner and show that he, notwithstanding the judgment of conviction, has not been guilty of such misconduct or transgression as to warrant his suspension or disbarment. As far as the conviction is concerned, there is nothing which this Court can do to set it aside. However, while it is conclusive of the attorney's conviction, it is not conclusive as to the misconduct on which he is sought to be suspended or disbarred. With regard to misconduct, the conviction only gives rise to a rebuttable presumption and the Court is then called on to decide whether the presumption thus created, if not rebutted, is one which convicts the defendant of such misconduct as to justify his suspension or disbarment."

The decision in this cause was dictated by Article XV, Section 8(7)(d) of the LOUISIANA STATE BAR ASSOCIATION Articles of Incorporation, which provides:

> "(7) After the conviction has become final, that is, all appeals have been concluded or exhausted, the procedure shall be as follows:
>
> "* * *
>
> "(d) At the hearing based upon a respondent's conviction of a crime, the sole issue to be determined shall be whether the crime warrants discipline, and if so, the extent thereof. At the hearing the respondent may offer evidence only of mitigating circumstances not inconsistent with the essential elements of the crime for which he was convicted as determined by the statute defining the crime."

One of the issues here is whether or not the application of the aforesaid Article XV in this cause violates the prohibition against the enactment and application of ex post facto laws, of the United States Constitution, Article 1, Sections 9 and 10; and the Louisiana Constitution of 1921, Article 4, Section 15, to the detriment of appellant. Generally speaking, a law is ex post facto which, in relation to an offense committed before its passage, alters the situation of a party to his disadvantage. *Kring* v. *Missouri*, 107 U.S. 221, 2 Sup. Ct. 443, 27 Lawyers Edition 506 (1882). Although the Supreme Court of Louisiana requested supplemental briefs on

this issue, the Constitutional issue of ex post facto was neither discussed as such, nor resolved, by said court in its decision herein, the court having adopted the position (contrary to the unbroken line of decisions of the Supreme Court of the United States, commencing with *Kring* v. *Missouri*, supra, that the controlling time is the date of the commission of a crime), that the effective date, in the opinion of the Louisiana Supreme Court, is the date that the United States Supreme Court denied appellant's application for writs in 1974. Thus the Supreme Court of Louisiana has totally ignored the clear language of the United States Supreme Court wherein the controlling date in ex post facto cases is the time of the commission of the crime, substituting therefor the date of finality of conviction.

There seems to be no serious dispute that the situation of appellant has been altered to his disadvantage by the adoption of the present Article XV. Under the laws governing disciplinary proceedings for attorneys in Louisiana prior to the effective date of the new Article XV, (1) there was no mandatory minimum of five (5) years required before application for reinstatement; (2) upon the person convicted being pardoned by the President or Governor, the court upon application could vacate or modify such order of disbarment; (3) conviction in a State or Federal Court merely set out a prima facie case of misconduct, which respondent might refute, whereas the new rule accepts the conviction as final and unassailable, provides for mandatory minimum and is silent with reference to application subsequent to pardon.

In *State* v. *Fourchy*, 31 So. 325, the Supreme Court of Louisiana held that these Constitutional prohibitions

directly apply to disciplinary proceedings of Louisiana attorneys in general, and to the subject matter of the instant cause in particular, and further, that the crucial point in time as to applicability of these legal principles is the date of the commission of the crime, not the effective date of the rule change. Despite the request for additional briefs, and much discussion in oral argument, the Honorable Supreme Court of Louisiana failed and refused to consider its prior decision, or give any credence thereto, completely ignoring its judicial duty to consider and apply in this cause the Constitutions of the United States and the State of Louisiana, and prior decisions of the Supreme Court of the United States and its own decision in *State* v. *Fourchy*, failing totally to dispose of the issue involving a substantial Federal question in any manner whatsoever.

The second issue here is whether appellant can be deprived of his right to practice law in the State of Louisiana without being afforded the opportunity to contest the recommendations against him in a full and fair hearing, on the basis of a statute which provides that the conviction is final, unrebuttable, and unassailable proof of misconduct, allowing the respondent the opportunity to offer evidence in mitigation only, and then merely evidence "not inconsistent with the essential elements of the crime for which he was convicted as determined by the statute defining the crime."

Thus the following questions are presented by this appeal:

1. Whether or not the application of the present Article XV of the LOUISIANA STATE BAR ASSOCIATION Articles of Incorporation in this cause, is offensive to and repugnate to and violative of the Constitution of the United States, including but not limited to the following:

   a. The Due Process clause, being a portion of the Fourteenth Amendment to the Constitution of the United States;

   b. The prohibition against enactment and application of ex post facto laws and bills of attainder, being a portion of United States Constitution Article 1, Sections 9 and 10, and its counter-part in the Louisiana Constitution of 1921, Article 4, Section 15.

Alternatively, in the event that this appeal shall have been improvidently taken, LLOYD E. HENNIGAN, JR. prays that these papers, were on this appeal was taken, be regarded and acted on as petition for writ of certiorari in accordance with the provisions of 28 U.S.C. 2103; 28 F.C.A. Sec. 2103.

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MARTIN S. SANDERS, JR.

PROOF OF SERVICE

STATE OF LOUISIANA

PARISH OF

BEFORE ME, the undersigned authority, personally came and appeared MARTIN S. SANDERS, JR., who being by me first duly sworn, did depose and say and certify that:

He is one of the attorneys for, and is counsel of record for LLOYD E. HENNIGAN, JR., petitioner and mover herein; that all of the statements of fact in the above and foregoing petition are true and correct to the best of his knowledge, information and belief; that a copy of this petition and motion has been served upon the LOUISIANA STATE BAR ASSOCIATION, by mailing a copy of thereof, postage prepaid, to its counsel of record herein THOMAS O. COLLINS, at New Orleans, Louisiana, this ____ day of December, 1976.

MARTIN S. SANDERS, JR.

SWORN TO AND SUBSCRIBED before me,
this ____ day of December, 1976.

NOTARY PUBLIC

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, §10, cl. i, United States Constitution:

> No State shall * * * pass any Bill of Attainder, ex post facto Law, * * *.

Article 15, §8, Articles of Incorporation, Louisiana State Bar Association (March 9, 1971):

Section 8. Conviction of a Crime

The following rules shall be applicable when a respondent has been convicted of a crime, to-wit:

(1) Upon learning that an attorney has been convicted of a crime, whether the conviction results from a plea of guilty or nolo contendere or a verdict after trial, the Committee on Professional Responsibility may secure a certificate of such conviction from the applicable Clerk of Court.

If the conviction is obtained in a Court of another state or a Federal Court, the Committee upon learning of the conviction, shall obtain two (2) copies of a certificate of conviction from the proper Court, and shall retain one (1) copy and may forward the other copy to the Supreme Court.

(2) The Committee shall then make a determination whether or not the crime of which the attorney has been convicted constitutes a serious crime. The term "serious crime" means a felony or any other crime, the necessary element of which as determined by the statute defining such crime, reflects upon the attorney's moral fitness to practice law.

It will be necessary for the Committee in determining whether or not the crime constitutes a "serious crime," to study the statute defining the crime, particularly if the crime involves the violation of a statute of the Federal Government or another state or jurisdiction.

(3) Upon completing its determination as to whether or not the crime constitutes a "serious crime," the Committee shall file a written report with the Supreme Court, setting forth its findings and conclusions.

(4) If the Supreme Court should concur with the opinion of the Committee that the crime of which the attorney has been convicted constitutes a serious crime, the Supreme Court may suspend the respondent from the practice of law and order the Committee to institute the necessary disciplinary proceedings, provided however, that the disciplinary proceedings so instituted will not, unless requested by the accused, be brought to a hearing until all appeals from the conviction are concluded.

(5) If the Committee in its report to the Supreme Court has concluded that the crime of which the at-

torney has been convicted is not a serious crime, or if the Supreme Court should determine independently that the crime is not a serious crime, the Supreme Court will refer the matter back to the Committee.

(6) An attorney will be reinstated immediately on the reversal of his conviction for a serious crime that has resulted in his suspension, but the reinstatement will not terminate any disciplinary proceedings then pending against the attorney.

(7) After the conviction has become final, that is, all appeals have been concluded or exhausted, the procedure shall be as follows:

(a) The Committee will file a petition in the Supreme Court seeking disbarment or any other remedy that the Committee deems appropriate, and the petition will be served upon the respondent in the same manner as in ordinary proceedings.

(b) When issue is joined by answer by the respondent, a Commissioner will be appointed by the Supreme Court to represent the Court in the same manner as in ordinary proceedings.

(c) At the hearing before the Commissioner, the certificate of the conviction of the respondent shall be conclusive evidence of his guilt of the crime for which he has been convicted.

(d) At the hearing based upon a respondent's conviction of a crime, the sole issue to be determined shall be whether the crime warrants discipline, and if so, the

extent thereof. At the hearing the respondent may offer evidence only of mitigating circumstances not inconsistent with the essential elements of the crime for which he was convicted as determined by the statute defining the crime.

(8) Except as provided hereinabove in this Section, the procedure with reference to proceedings based on a conviction of a crime, shall be conducted in the same manner as in ordinary proceedings.

Former *Article 13, §12, Articles of Incorporation, Louisiana State Bar Association* (March 15, 1941):

Section 12. Member convicted of felony

Whenever any member of the bar shall be convicted of a felony and such conviction shall be final, the Committee may present to the Supreme Court a certified or exemplified copy of the judgment of such parties shall have twenty days from the time of the filing of the report to file exceptions thereto, and if no exceptions are, within that period, filed by either party, the report shall stand confirmed. If the exceptions are filed, they shall stand for hearing before the court on the summary docket, and on the record prepared by and before the commissioner. For sufficient cause shown, the court may permit evidence taken before the commissioner to be supplemented by hearing in open court.

APPENDIX G

SUPREME COURT OF LOUISIANA

NO. 55,436

LOUISIANA STATE BAR ASSOCIATION,
Petitioner

versus

LLOYD E. HENNIGAN, JR.,
Respondent

PEREMPTORY EXCEPTION

Now into court, through undersigned counsel, comes LLOYD E. HENNIGAN, JR., made respondent herein, and peremptorily excepts to plaintiff's petition on the grounds that it fails to state a cause of action and should be dismissed, because plaintiff brings its action under the provisions of LSA Vol. 21-A, Articles of Incorporation of the Louisiana State Bar Association, Article XV, effective September 1, 1971, whereas the actions complained of occurred prior to April, 1967; that any such disciplinary proceedings are necessarily governed by Article XIII of the Articles of Incorporation of the Louisiana State Bar Association in effect prior to September 1, 1971; that all proceedings in this cause, and the regulation of all evidence has been had under the present Article XV, and are tainted by the fact that they have been brought

under the wrong statute, to the prejudice of respondent.

WHEREFORE, respondent prays that this peremptory exception be filed and maintained, and plaintiff's petition and these proceedings be dismissed in their entirety at plaintiff's cost; and for general relief.

By his attorneys:

LLOYD E. HENNIGAN, JR.
ALFRED A. MANSOUR
MARTIN S. SANDERS, JR.
/s/ LLOYD E. HENNIGAN, JR.
LLOYD E. HENNIGAN, JR.
P. O. Box 190
Winnfield, Louisiana 71483
Of Counsel for
Respondent

CERTIFICATE

I hereby certify that copies of the foregoing exception have been served on Messrs. THOMAS O. COLLINS, JR. and LEONARD FUHRER, Counsel for petitioner, this 7th day of October, 1976.

/s/ LLOYD E. HENNIGAN, JR.
COUNSEL